IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALEA LONDON LIMITED	:	**CIVIL ACTION**
	:	
v.	:	**NO. 05-CV-4902**
	:	
EL PAILON, INC., et al.	:	
	:	
	:	

MEMORANDUM AND ORDER

Kauffman, J. **March 13, 2007**

Defendants El Pailon, Inc., Maria Delgado,[1] and Carlos Delgado[2] (the "El Pailon Defendants") have been sued in two separate state court actions (the "underlying actions") for damages arising out of two shooting deaths at El Pailon Restaurant. The El Pailon Defendants are insured by Plaintiff Alea London Limited ("Plaintiff"). Plaintiff brings the instant diversity action against all Defendants,[3] seeking a declaration that it has no duty either to defend the underlying state actions or to indemnify the El Pailon Defendants in the event they are found liable in those actions.[4]

Now before the Court is Plaintiff's Motion for Judgment on the Pleadings (the "Motion").

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[1] Maria Delgado is President of El Pailon, Inc. See Compl. ¶ 3.

[2] Carlos Delgado is Secretary of El Pailon, Inc. See Compl. ¶ 4.

[3] El Pailon, Inc.; Maria Delgado; Carlos Delgado; Anna G. Ramirez, individually and as Administratrix of the Estate of Ezell Santana; Iris Gonzalez, individually and as Administratrix of the Estate of Daniel Gonzalez; Daniel Gonzalez, Jr.; and U.S. Underwriters Ins. Co. (collectively, "Defendants").

[4] The two underlying state actions have now been consolidated and stayed pending the resolution of the present action.

The Court heard oral argument on February 28, 2007, during which the parties preliminarily addressed whether the Court should exercise its discretion under the Declaratory Judgment Act, 28 U.S.C. § 2201 (the "DJA"), to decline jurisdiction.[5] For the reasons that follow, the Court will decline jurisdiction and dismiss the instant action.

I. BACKGROUND

A. The Underlying State Court Actions

Drawing all reasonable inferences in favor of Defendants, the facts are as follows. El Pailon is a restaurant located in Philadelphia, Pennsylvania. On March 7, 2003, Ezell Santana and Daniel Gonzalez were fatally shot by a third party while patronizing El Pailon. See Compl. ¶¶ 22, 27. On March 4, 2005, Defendant Anna Ramirez ("Defendant Ramirez") filed an action in the Court of Common Pleas of Philadelphia County against the El Pailon Defendants (the "Ramirez action"), alleging that various acts of "negligence, carelessness, and/or recklessness" on the part of the El Pailon Defendants led to the death of Ezell Santana. See Compl. ¶ 23; Mot. at ¶¶ 7, 9; U.S. Underwriters Resp. at ¶¶ 7, 9; Gonzalez Resp. at ¶¶ 7, 9.

On February 22, 2005, Defendants Iris Gonzalez and Daniel Gonzalez (the "Gonzalez Defendants") filed an action in the Court of Common Pleas of Philadelphia County against the El Pailon Defendants and Joel Morales (the "Gonzalez action"), alleging that the "negligent, careless, willful, wanton, and reckless actions, inactions, and disregard" of the El Pailon Defendants were the "factual cause" of the fatal shooting of Daniel Gonzalez. See Compl. ¶ 28;

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[5] In their Supplemental Brief in opposition to Plaintiff's Motion, the El Pailon Defendants argued that the Court should decline to exercise jurisdiction. In any event, the Court has the power to decline jurisdiction *sua sponte* See State Auto Insurance Co. v. Summy, 234 F.3d 131, 136 (3d Cir. 2000).

Mot. at ¶¶ 11, 12, 14; U.S. Insurance Resp. at ¶¶ 11, 12, 14; Gonzalez Resp. at ¶¶ 11, 12, 14.

B. The Insurance Policy

On March 1, 2002, Plaintiff insurance company underwrote a commercial general liability insurance policy covering El Pailon, Inc. for the period May 10, 2002 to May 10, 2003 (the "Policy"). Compl. ¶ 12. The Policy provides commercial general liability limits in the amount of one million dollars per occurrence and one million dollars in the general aggregate. See Plaintiff Alea London Limited's Motion for Judgment on the Pleadings ("Mot.") at ¶ 18; Answer of U.S. Underwriters Insurance Company to the Motion of Alea London Limited for Judgment on the Pleadings ("U.S. Underwriters Resp.") at ¶ 18; Gonzalez Response in Opposition to Plaintiff's Motion for Judgment on the Pleadings ("Gonzalez Resp.") at ¶ 18.[6]

Under the terms of the Policy, Plaintiff is responsible for paying the insured:

> those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. [Plaintiff] will have the right and duty to defend the insured against any "suit" seeking those damages. However, [Plaintiff] will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply.

Mot. at ¶ 20; U.S. Underwriters Resp. at ¶ 20; Gonzalez Resp. at ¶ 20. However, the Policy includes a Combination Endorsement containing an assault and battery exclusion, a liquor liability exclusion, and a punitive damages exclusion. Under the assault and battery exclusion, the Policy does not cover bodily injury or property damage:

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[6] The El Pailon Defendants submitted a response to Plaintiff's Motion, adopting the responses submitted by U.S. Underwriters and by the Gonzalez Defendants. Accordingly, for purposes of this Motion, any facts admitted by U.S. Underwriters and the Gonzalez Defendants in their responses will be deemed admitted by the El Pailon Defendants as well.

> (1) Expected or intended from the standpoint of the insured; or
>
> (2) Arising out of an assualt [sic] or battery, provoked or unprovoked, or out of any act or omission in connection with prevention or supression [sic] of an assault or battery, committed by an insured or an employee or agent of the insured.

Mot. at ¶ 23; U.S. Underwriters Resp. at ¶ 23; Gonzalez Resp. at ¶ 23. The liquor liability exclusion precludes coverage for bodily injury or property damage resulting from certain activities related to the furnishing, sale, gift, or distribution of alcohol by the insured or its indemnities. See Mot. at ¶ 24; U.S. Underwriters Resp. at ¶ 24; Gonzalez Resp. at ¶ 24. The punitive damages exclusion precludes coverage for "any claim of or indemnification for punitive or exemplary damages," but provides for the defense of such claims under certain circumstances. See Mot. at ¶ 25; U.S. Underwriters Resp. at ¶ 25; Gonzalez Resp. at ¶ 25.

Plaintiff filed the instant action on September 13, 2005, seeking a declaratory judgment that it has no duty under the Policy either to defend the El Pailon Defendants in the Ramirez and Gonzalez actions or to indemnify them with respect to either action. A default was entered against Defendant Ramirez on July 13, 2006 after she failed to appear or to file an answer; the remaining defendants filed answers to the Complaint. Plaintiff subsequently filed the instant Motion seeking a judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c).

II. LEGAL STANDARD

The Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, provides that a district court "*may* declare the rights and other legal relations of any interested party seeking such declaration..." 28 U.S.C. § 2201(a) (emphasis added). The United States Supreme Court has interpreted this language to mean that "district courts possess discretion in determining whether

and when to entertain an action under the Declaratory Judgment Act, even when the suit otherwise satisfies subject matter jurisdictional prerequisites." Wilton v. Seven Falls Company, 515 U.S. 277, 282 (1995). Thus, "[i]n the declaratory judgment context, the normal principle that federal courts should adjudicate claims within their jurisdiction yields to considerations of practicality and wise judicial administration." Wilton, 515 U.S. at 288.

The Third Circuit has held that the relevant considerations are:

(1) A general policy of restraint when the same issues are pending in state court;
(2) An inherent conflict of interest between an insurer's duty to defend in a state court and its attempt to characterize that suit in federal court as falling within the scope of a policy exclusion;
(3) Avoidance of duplicative litigation.

State Auto Insurance Cos. v. Summy, 234 F.3d 131, 134 (3d Cir. 2001) (citing U.S. v. Commonwealth of PA, Dept. Of Environmental Resources, 923 F.2d 1071, 1075-76 (3d Cir. 1991)). In addition, district courts should be "particularly reluctant" to exercise jurisdiction over declaratory judgment actions "where the applicable state law is uncertain or undetermined." Id. at 135.

III. ANALYSIS

Under Pennsylvania law, an insurer such as Plaintiff has two separate duties to its insureds: (1) the duty to defend against claims where the allegations are sufficient to bring those claims under the terms of the policy, and (2) the duty to pay that which it has agreed to pay in appropriate cases under the terms of the policy. See, e.g., Harleysville Mut. Ins. Co. v. Madison , 609 A.2d 564, 566 (Pa. Super. Ct. 1992); Britamco Underwriters, Inc. v. Weiner, 636 A.2d 649, 651 (Pa. Super. Ct. 1994) ("The duty to defend is a distinct obligation, separate and apart from

the insurer's duty to provide coverage") (citations omitted). An insurer's duty to defend an action brought against one of its insureds is determined solely by the allegations in the underlying complaint. See Gene's Rest., Inc. v. Nationwide Ins. Co., 548 A.2d 246, 246 (Pa. 1988) (citations omitted). An insurer is not required to defend an action if there is no possibility that any of the underlying claims could fall within the policy's coverage. See Wilson v. Maryland Cas. Co., 105 A.2d 304, 307 (Pa. 1954). However, as long as at least one of the underlying claims is covered by the policy, regardless of whether the underlying claims are groundless, false, or fraudulent, the insurer must defend the entire action until such time as the claims are confined to a theory of recovery that the policy does not cover. Terra Nova Ins. Co. v. 900 Bar, Inc., 887 F.2d 1213, 1226 (3d Cir. 1989); Weiner, 636 A.2d at 651.

Plaintiff asserts that it has no duty to defend the underlying actions even though they sound solely in negligence because all of the claims in those actions fall within one of the Policy's exclusions.[7] In support of this argument, Plaintiff relies heavily on a prior declaratory judgment action it filed in this District. See Alea London Ltd. v. 65 Bog, Inc., 2006 U.S. Dist. LEXIS 21062 (E.D. Pa. April 19, 2006).

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[7] Defendants concede that the Policy's punitive damages exclusion precludes coverage for any punitive damages claims made in the Ramirez and Gonzalez actions. Mot. at ¶ 26; U.S. Underwriters Resp. at ¶ 26; Gonzalez Resp. at ¶ 26. The Gonzalez Defendants (and consequently the El Pailon Defendants as well) also concede that the Policy's liquor liability exclusion precludes coverage for the Dram Shop claims made in the underlying actions. See Gonzalez Brief in Opposition to Plaintiff's Motion for Judgment on the Pleadings ("Gonzalez Brief") at p. 2. U.S. Underwriters has not conceded that the liquor liability exclusion precludes coverage for the Dram Shop claims. However, the Court agrees with Plaintiff and the other defendants that these claims are precluded under the Policy's liquor liability exclusion. Thus, the sole issue left for this Court is whether the Policy's assault and battery exclusion precludes coverage of the remaining claims in the underlying actions, thereby eliminating any duty to defend on the part of Plaintiff.

Defendants argue, however, that Pennsylvania law dictates a different outcome, pointing to a recent Pennsylvania Superior Court decision addressing the duty of an insurance company to defend its insureds in actions sounding solely in negligence. In QBE Insurance Corp. v. M&S Landis Corp., 2007 WL 60995 (Pa. Super. Ct. Jan. 10, 2007), the Pennsylvania Superior Court considered an insurance company's request for a declaration that it had no duty to defend an underlying action in which it was alleged that the insured's patron was smothered to death when he was evicted by the insured's employees. The Superior Court held that "in light of the allegations of negligence in the underlying complaint which seeks relief only for negligence, the assault and battery exclusion [at issue] does not apply." QBE, 2007 WL 60995, at *7. In reaching its decision, the Superior Court distinguished the QBE case from Acceptance Ins. Co. v. Seybert, 757 A.2d 380 (Pa. Super. Ct. 2000), a case in which the Superior Court held that the insurer had no duty to defend an underlying action in which there "were no allegations that [the victim's] actual injuries were caused in any way other than by assault and battery by the five men in [the bar's] parking lot." QBE, 2007 WL 60995, at *6.

Defendants assert that the QBE decision stands for the proposition that, in Pennsylvania, an insurer is obligated to defend an insured even though there is an assault and battery exclusion in the insurance policy whenever the underlying complaint sounds solely in negligence. See Gonzalez Defendants' Supplemental Brief in Opposition to Plaintiff's Motion for Judgment on the Pleadings ("Gonzalez Supp. Brief") at 2; El Pailon Defendants' Supplemental Brief in Opposition to Plaintiff's Motion for Judgment on the Pleadings ("El Pailon Supp. Brief") at 2-3. Applying Defendant's interpretation of QBE, Plaintiff would have a duty to defend the underlying actions in this case because the underlying complaints sound solely in negligence.

Plaintiff, on the other hand, distinguishes the instant case from QBE because in that case the insureds (or at least their employees) "actually had their hands on the decedent" and there were specific claims only of negligence – not assault and battery – against the insureds arising out of that alleged contact. See Plaintiff's Response to Gonzalez Supp. Brief at 5. Thus, Plaintiff argues, Defendants are reading the QBE holding too broadly by interpreting it to apply in actions where there is no doubt that the injuries were caused by an assault and battery committed by someone other than the insured or its employees. Moreover, the Plaintiff argues that the instant case is more akin to the Seybert case than the QBE case because the decedents' "actual injuries" in this case were caused by third parties rather than the insureds, who never "had their hands on" the decedents. See id. at 4. At oral argument, Plaintiff further likened the facts of the instant case to Seybert, asserting that the alleged shootings did not occur inside the El Pailon restaurant.

The applicable state law regarding an insurer's duty to defend actions sounding solely in negligence appears to be unsettled. Few Pennsylvania state courts have had the opportunity to consider the breadth of the recent QBE decision. At least one state court has found QBE to be distinguishable, holding that an insurer does not have a duty to defend an underlying action containing negligence claims similar to those in this case.[8] Furthermore, the Pennsylvania Superior Court's decision in Donegal Mutual Insurance Co. v. Baumhammers, 893 A.2d 797 (Pa.

[8] In Regis Insurance Co. v. 1717, Inc., et al., August Term 2005 No. 4387, the Court of Common Pleas of Philadelphia County found that the insurer had no duty to defend or indemnify its insureds in an underlying action seeking damages for the death of a patron who was assaulted and repeatedly stabbed by a third party while on the insured's premises. The underlying complaint alleged negligent failure to provide safe and secure premises, failure to supervise and train personnel, and failure to adopt and implement appropriate security measures.

Super. 2006), a case involving many of the same issues of state law before this Court, is currently on appeal before the Pennsylvania Supreme Court. Accordingly, a Pennsylvania state court would be a more appropriate forum for resolving the state law issues in this case. See Summy, 234 F.3d at 136 ("In order to maintain the proper relationship between federal and state courts, it is important that district courts 'step back' and allow the state courts the opportunity to resolve unsettled state law matters").

Moreover, there are no federal questions presented in this action, see Summy, 234 F.3d at 136, and there are disputed factual issues in the underlying state court actions – for example, whether the shootings that resulted in the deaths of Mr. Santana and Mr. Gonzalez were intentional. See id. at 134 (one consideration for district courts deciding whether to exercise jurisdiction over a declaratory judgment action is a "general policy of restraint when the same issues are pending in state court"). These factual issues will require discovery in both the state and federal actions, and will need to be resolved in both as well. See id. (another consideration for district courts deciding whether to exercise jurisdiction over a declaratory judgment action is "[a]voidance of duplicative litigation"). In light of the numerous factors supporting state court resolution of the issues in this case, the Court will decline to exercise federal jurisdiction and dismiss the instant action.

IV. CONCLUSION

For the foregoing reasons, the Court will decline to exercise jurisdiction and the action will be dismissed. An appropriate Order follows.

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ORDER

AND NOW, this 13th day of March, 2007, upon consideration of Plaintiff's Motion for Judgment on the Pleadings (docket no. 22), all responses thereto (docket nos. 24, 25, 26, 27, 29, 30, and 32), the arguments presented at the February 28, 2007 oral argument, and for the reasons stated in the accompanying Memorandum, it is **ORDERED** that:

(1) The Court will **DECLINE** to exercise jurisdiction over this action; and

(2) The above-referenced action is **DISMISSED**.

Accordingly, the Clerk of the Court shall mark this case **CLOSED**

BY THE COURT:

/s/ Bruce W. Kauffman
BRUCE W. KAUFFMAN, J.